Thank you for this opportunity to comment on the MSRB's Rule G-23 proposal.

I support the Board's proposal to amend Rule G-23.

I also agree generally with the MSRB's approach in its proposed interpretative notice regarding Rule G-23. The MSRB is proposing an interpretation under Rule G-23 that would treat underwriters as financial advisors in certain facts and circumstances despite providing "advice" to issuers. Among other things, the interpretation states—

> For purposes of Rule G-23, a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue. However, that presumption may be rebutted if the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue. Thus, a dealer providing advice to an issuer with respect to the issuance of municipal securities (including the structure, timing, and terms of the issue and other similar matters, such as the investment of bond proceeds, a municipal derivative, or other matters integrally related to the issue) generally will not be viewed as a financial advisor for purposes of Rule G-23, if such advice is rendered in its capacity as underwriter for such issue. Nevertheless, a dealer's subsequent course of conduct (*e.g.*, representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue. In that case, the dealer will be precluded from underwriting that issue by Rule G-23(d).

That proposal is a positive contribution. I believe, however, that the penultimate sentence should not contain the words "subsequent" or "only." It is possible that a dealer may make representations or engage in conduct *at the very outset of a relationship* that leads a municipal entity or obligated person to believe the dealer, even though labeled" underwriter," is providing such advice in the municipal entities' or obligated persons' best interests.

Moreover, the "advice" may have additional subsidiary, incidental or other functions in addition to being offered in an issuer's best interests. Thus, the use of the word "only" is excessively restrictive.

In addition, in the parenthetical statement in that sentence, I suggest adding the following after "representing to the issuer": ", or making other statements or engaging in conduct leading the issuer to believe,". Even if a direct explicit representation is not made, there are a variety of words and conduct that may lead vulnerable municipal entities and obligated persons to believe that an underwriter's advice places their interests first and is provided in their best interests.

The sentence, as so modified, would read: "Nevertheless, a dealer's course of conduct (*e.g.*, representing to the issuer, or making other statements or engaging in conduct leading the issuer to believe, that the dealer is acting in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to such issue."

I do remain skeptical that merely informing an issuer that a dealer will be an "underwriter" is sufficient to whitewash the dealer's advice to the issuer. Large numbers of issuers do not know the difference between and an "underwriter" and a "financial advisor." Bond counsel often do not advise the issuers about the difference. Unstated technical meanings of terms that lay people serving as issuer officials fail to appreciate can result in misplaced reliance that harms both issuers and investors. My suggestions above would help in that regard, but it would be better if the dealer informs the issuer affirmatively that the advice is not offered in a fiduciary capacity, with an explanation of what that means.

For example, although it is not general practice, there are underwriters that tell issuers at the outset of the relationship, in order to gain employment, that the underwriters will "represent" the issuers and will advise the issuers about transactional risks, concerns, cash flows and strategies. Such statements lead to heavy reliance by the most unsophisticated and vulnerable issuers directly upon the underwriters and to the exclusion of the issuers then seeking appropriate advice from financial professionals that recognize their fiduciary duties to the issuers.

Now that the Dodd-Frank statutory structure is in place, and the regulatory structure is beginning to take shape, I submit respectfully that the Commission should encourage issuers to seek appropriate advice from regulated municipal advisors who are subject to the fiduciary duty and other aspects of municipal advisor regulation. When issuers rely upon inappropriate advice that is not in their best interests, that advice may supplant the advice the issuers should receive. Further, it may lead to the conduct of transactions that should not be conducted and to faulty disclosure to investors (especially when underwriters or their counsel prepare official statements).

It is not difficult for underwriters to avoid any misunderstandings as to the character of their advice. For example, echoing Robert Fippinger's sound advice that "the parties should contractually clarify the status of the [dealer] firm," the Securities Industry and Financial Markets Association ("SIFMA") stated in its "Bond Purchase Agreement—Governmental Tax- or Revenue-Supported Securities—Instructions and Commentary" (9/17/08), as follows—

> *Commentary*: Section 3 of the BPA Terms and Acceptance (second paragraph) clarifies the nature of the relationship under the Agreement between the Underwriters and the Issuer. In particular, that language confirms that the Underwriters and the Issuer are acting on an arm's length, commercial basis and that *no Underwriter is acting as a fiduciary or agent of the Issuer*. This paragraph *should be discussed* with the Senior Manager and the Issuer. *If the relationship between the Issuer and an Underwriter differs from that described in the paragraph, the language in that paragraph should be modified or deleted as appropriate*. [Emphasis added.]

SIFMA, therefore, recommended two important and constructive steps for dealers serving as underwriters—

- Explicit discussion with issuers underscoring the nonfiduciary character of typical underwriter-issuer relationships; and

- Explicit recognition in bond purchase agreements of atypical facts and circumstances in which underwriters do assume fiduciary roles.

SIFMA itself recognized that underwriters may have fiduciary duties to issuers ("If the relationship between the Issuer and an Underwriter differs from that described in the paragraph").

I submit respectfully that SIFMA's language presents a workable methodology through which underwriters may avoid a fiduciary duty. I suggest respectfully that the Commission adopt those views.

Of course, the explicit discussions should occur with a issuers' policy makers and should entail explanation of important consequences of the nonfiduciary character of typical underwriter-issuer relationships. In that vein, the discussions should clarify that underwriters' "advice" is not proffered placing the issuers' interests first or in their best interests.

In addition, the discussions should occur at the outset of the relationships and, in any event, prior to the time that issuers commit themselves to particular courses of action, such as committing them to engage the dealers as underwriters or to particular forms of transactions or plans of finance.

Overall, I support the Board's proposal and consider it to be a very good effort.

Robert Doty

AGFS